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No. 00-1244

In the Supreme Court of the United States

RALPH NADER, ET AL., PETITIONERS

v.

FEDERAL ELECTION COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, imposes various restrictions on the manner in which campaigns for federal office may be financed. Pursuant to statutory authority, the Federal Election Commission (FEC) has promulgated regulations, see 11 C.F.R. 110.13, 114.4(f), that allow corporations to donate funds to a nonprofit staging organization to help defray the costs of conducting debates among competing federal candidates. The question presented is as follows:

Whether the challenged FEC regulations reflect a permissible construction of the FECA.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-57a) is reported at 230 F.3d 381. The opinion of the district court (Pet. App. 58a-91a) is reported at 112 F. Supp. 2d 172.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 2000. The petition for a writ of certiorari was filed on January 30, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case presents a statutory challenge to regulations promulgated pursuant to the Federal Election

Campaign Act of 1971 (FECA or Act), 2 U.S.C. 431 *et seq.*, concerning the manner in which debates among candidates for federal office may be sponsored and financed. The challenged "debate regulations," 11 C.F.R. 110.13, 114.4(f), allow corporations and labor organizations to donate funds to certain nonprofit organizations to stage candidate debates. Petitioners contend that the regulations are inconsistent with FECA's general prohibition on corporate and union contributions and expenditures in support of candidates for federal office.

1. The FECA provides that "[i]t is unlawful * * * for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election" for federal office. 2 U.S.C. 441b(a). The Act defines the term "contribution" to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. 431(8)(A)(i). The term "expenditure" is defined to include "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. 431(9)(A)(i). The definition of "expenditure" specifically excludes, *inter alia*, "nonpartisan activity designed to encourage individuals to vote or to register to vote." 2 U.S.C. 431(9)(B)(ii). Section 441b also identifies three categories of disbursements that are specifically excluded, for purposes of Section 441b itself, from the term "contribution or expenditure." See 2 U.S.C. 441b(b)(2). One of those categories is "nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a

labor organization aimed at its members and their families." 2 U.S.C. 441b(b)(2)(B).

2. In 1979, the Federal Election Commission (FEC or Commission) promulgated regulations defining the circumstances under which corporations and labor unions may participate in the staging and financing of debates among competing candidates for federal office. See 11 C.F.R. 110.13, 114.4(f). Only a nonprofit organization under 26 U.S.C. 501(c)(3) or 26 U.S.C. 501(c)(4) (1994 & Supp. IV 1998) that "do[es] not endorse, support, or oppose political candidates or political parties[,]" 11 C.F.R. 110.13(a)(1), or a media entity "not owned or controlled by a political party, political committee or candidate[,]" 11 C.F.R. 110.13(a)(2), is permitted to stage a candidate debate. A debate must "include at least two candidates" and the staging organization may not "structure the debates to promote or advance one candidate over another." 11 C.F.R. 110.13(b). Staging organizations "must use preestablished objective criteria to determine which candidates may participate in a debate," and for general election debates the organization "shall not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate." 11 C.F.R. 110.13(c).

The debate regulations permit corporations and labor organizations to donate funds to a nonprofit staging organization to help defray the costs of staging the debate. 11 C.F.R. 114.4(f)(1) and (3). Donations authorized by Section 114.4(f) are also expressly excluded from the general regulatory definitions of "contribution" and "expenditure." See 11 C.F.R. 100.7(b)(21)

("contribution"); 11 C.F.R. 100.8(b)(23) ("expenditure").[1]

3. Petitioners in this case are presidential candidate Ralph Nader, his authorized campaign committee, and the political party under whose auspices Nader competed in the year 2000 presidential campaign. Petitioners filed suit against the FEC in federal district court, alleging that the Commission's debate regulations are inconsistent with the FECA insofar as they allow business corporations to contribute money to the

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[1] Pursuant to 2 U.S.C. 438(d), the Commission first submitted proposed debate regulations to Congress on June 28, 1979. See 44 Fed. Reg. 39,348. Approximately three months later, the Senate adopted a resolution disapproving those proposed regulations. See 125 Cong. Rec. 24,958 (1979). "[W]hen the Senate rejected the initial proposal, the floor statements of the resolution's cosponsors indicated that the Senate was concerned that the initial proposed regulations were too intrusive and burdensome on debate sponsors, not too permissive in allowing corporate sponsorship of debates." Pet. App. 34a n.17. Senator Pell, a sponsor of the disapproval resolution, stated that "any regulation which could be interpreted as being burdensome to organizations which are likely to sponsor candidate debates, or which could in any way impede the heretofore successful debate procedure that has evolved through direct arrangements made between sponsors and candidates should not be allowed to take effect." 125 Cong. Rec. 24,957 (1979). He expressed particular concern that the proposed regulations would have precluded broadcast and print media entities from sponsoring candidate debates. *Ibid.*

On December 20, 1979, the Commission submitted to Congress the revised debate regulations that are the subject of this case. 44 Fed. Reg. 76,734-76,735. Congress did not pass any resolution of disapproval concerning those regulations, which became effective on April 1, 1980. See 45 Fed. Reg. 21,210. The debate regulations were revised in 1995 in several respects unrelated to the question presented in the petition for certiorari. See 60 Fed. Reg. 64,260-64,279.

Commission on Presidential Debates (CPD) for use in staging presidential debates. See C.A. App. 9-19 (complaint); Pet. App. 59a. The complaint further alleged that "[petitioner] Nader is harmed and aggrieved by the FEC's Debate Regulations because the regulations permit illegal corporate money to be used to support debates between major party candidates that exclude independent and third party candidates. These debates corrupt the political process, undermine [petitioner] Nader's campaign for the presidency and deny Nader his right fairly to compete for the presidency on a level playing field." C.A. App. 16.

The district court entered final judgment on the merits in favor of the Commission, holding that the challenged regulations reflect a permissible interpretation of the FECA. Pet. App. 58a-91a; C.A. App. 250 (judgment). The court held that petitioners had standing to sue, essentially on the theory that the Democratic and Republican candidates for President would receive a competitive advantage over petitioner Nader as a result of the corporate-funded publicity provided by the CPD debates. Pet. App. 70a-77a.[2] On the merits, the court held that petitioners had failed to establish a likelihood of success on their claim that the challenged regulations are inconsistent with the FECA. *Id.* at 80a-91a. Pursuant to a stipulation between the parties, the district court subsequently entered final

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[2] The plaintiffs in the district court also included individual voters. The district court held that those plaintiffs lacked standing to sue, see Pet. App. 77a-79a, and the court of appeals reached the same conclusion, see *id.* at 17a-19a. Those plaintiffs are not petitioners in this Court, see Pet. ii, and their standing is therefore no longer at issue.

judgment in favor of the Commission on the basis of its earlier opinion. C.A. App. 250.

4. The court of appeals affirmed. Pet. App. 1a-57a.

a. The court held that petitioners had established standing to sue under the standards announced in its prior decision in *Vote Choice, Inc.* v. *DiStefano*, 4 F.3d 26 (1st Cir. 1993). The court observed that "[a]t the time that [petitioners] brought this suit, Nader still stood a chance of being invited to participate in the debates," Pet. App. 7a, and it stated that the question of standing should be resolved on the basis of the facts as they existed at the time the complaint was filed, see *id.* at 8a-9a n.3. The court accepted petitioners' argument that they had adequately alleged a competitive injury on the ground that "given Nader's choice not to accept corporate contributions, the FEC's regulations allowing corporate sponsorship of the debates effectively bar him from participating even if he qualifies for an invitation." *Id.* at 8a; see *id.* at 15a ("By allowing corporate sponsorship of the debates, the regulations threatened to force Nader to decline an invitation to participate in the debates, and that threat affected the conduct of his campaign.").

b. The court of appeals sustained the challenged debate regulations as resting on a permissible interpretation of the FECA. The court held that the Commission's construction of the Act is entitled to deference under the principles announced in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The court explained that "it is not clear on the face of the [FECA] definitions of 'contribution' and 'expenditure' that corporate disbursements to nonpartisan debate staging organizations even fall within the scope of the Act's coverage," Pet. App. 28a-29a, and further explained that the "statutory phrase 'non-

partisan activity designed to encourage individuals to vote or register to vote' at Section 431(9)(B)(ii) gives the Commission some leeway to interpret the term 'activity' and to decide which activities so 'encourage' people," *id.* at 30a. The court of appeals also explained that "Congress intended to delegate broad policymaking discretion to the FEC," *id.* at 29a (citing 2 U.S.C. 437), and it found that the Act's legislative history and "Congress's apparent acquiescence in the regulations under the 'report and wait' requirements of the FECA" support the Commission's interpretation, *id.* at 30a-34a. While acknowledging that "[petitioners'] interpretation of the FECA is also not unreasonable," the court of appeals sustained the challenged regulations on the ground that "Congress gave the choice as to the preferred reasonable interpretation to the FEC." *Id.* at 36a-37a.

c. Chief Judge Torruella filed a separate concurring opinion. Chief Judge Torruella agreed that the district court had acted properly in dismissing the suit, but he would have based that disposition on the grounds that petitioners lack standing and that the case has become moot. He explained that because petitioner Nader was not invited to participate in the CPD debates, he was not subjected to any "coercive choice" as a result of the Commission's decision to permit corporate financial support of those debates. Pet. App. 43a-44a. Chief Judge Torruella also rejected petitioners' effort to establish standing on the theory "that the corporate contributions to the CPD impermissibly help his competitors, essentially providing Gore and Bush with inexpensive access to extensive media coverage." *Id.* at 49a. He explained that while the sponsoring corporations and/or the CPD might plausibly be regarded as the beneficiaries of the challenged regulations, peti-

tioners do not compete against those entities and therefore could not establish standing on a competitive-injury theory. *Id.* at 52a-53a.

ARGUMENT

The court of appeals correctly rejected petitioners' challenge to the FEC regulations governing corporate funding of candidate debates. The court's decision does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.[3]

1. The court of appeals correctly accorded deference to the Commission's regulatory approach under the principles announced in *Chevron*. Neither the definitional provisions of 2 U.S.C. 431(8) and (9), nor the restrictions on corporate and union campaign spending contained in 2 U.S.C. 441b, unambiguously resolve the question whether a corporate or union disbursement to a nonprofit organization to defray the costs of staging debates among competing candidates is a prohibited "contribution" or "expenditure." The FECA is therefore ambiguous with respect to "the precise question at issue" in this case. *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 496 U.S. 633, 647 (1990) (quoting *Chevron*, 467 U.S. at 842-843). Congress vested the Commission with broad authority to promulgate rules "to carry out the provisions of [the FECA]," 2 U.S.C. 438(a)(8), and to "formulate policy" with respect to the Act. 2 U.S.C. 437c(b)(1). Accordingly, this Court has long recognized that the FEC is "precisely the type of agency to which deference should presumptively be afforded." *FEC* v.

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[3] Although we agree with the court of appeals that petitioners' statutory challenge lacks merit, we continue to believe—essentially for the reasons stated in Chief Judge Torruella's concurring opinion—that petitioners lack standing to sue.

Democratic Senatorial Campaign Comm. (DSCC), 454 U.S. 27, 37 (1981).

2. Petitioners contend (Pet. 9) that the court of appeals' "approach to the review of an agency's statutory interpretation is in conflict with a number of recent decisions by the D.C. Circuit that illustrate the proper application of *Chevron*." That claim is without merit. The decisions on which petitioners rely simply recognize that an administrative agency ordinarily lacks power to announce exceptions to a facially unqualified and unambiguous statutory command. See *American Bus Ass'n* v. *Slater*, 231 F.3d 1, 4 (D.C. Cir. 2000) ("Congress unambiguously intended to preclude [the Department of Transportation] from authorizing money damages" because the statute's "carefully crafted remedies scheme reveals" the legislative "intent to deny agencies the power to authorize supplementary monetary relief"); *Backcountry Against Dumps* v. *EPA*, 100 F.3d 147, 151 (D.C. Cir. 1996) ("[T]he statute here is neither silent nor ambiguous. It is quite clear."); *Ethyl Corp.* v. *EPA*, 51 F.3d 1053, 1058 (D.C. Cir. 1995) ("The language of the provision * * * is specific and definite.").

In the instant case, the court of appeals did not suggest that the FEC has power to announce an extra-statutory *exception* to the FECA ban on corporate and union "contributions" and "expenditures" in support of federal candidates. Rather, the court recognized that the FECA does not clearly resolve the question whether the disbursements at issue here constitute "contributions" or "expenditures" within the meaning of the Act, and that the Commission's resolution of that

interpretive question is therefore entitled to deference.[4] See Pet. App. 28a-29a ("[I]t is not clear on the face of the definitions of 'contribution' and 'expenditure' that corporate disbursements to nonpartisan debate staging organizations even fall within the scope of the Act's coverage in the first instance."). That holding is fully consistent with District of Columbia Circuit precedent. Any difference in outcomes between the pertinent District of Columbia Circuit cases and the decision below reflects not a fundamentally different approach to *Chevron*, but the difference between the FECA and the statutes considered by the District of Columbia Circuit.[5]

3. The court of appeals correctly found that the Commission's debate regulations reflect a permissible construction of the FECA. The primary purpose of

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[4] Contrary to petitioners' assertion (Pet. 9 n.4), the Commission has consistently taken the position, both in its rulemaking and in its brief in the court of appeals, that Section 441b is ambiguous as to whether a corporate or union donation to help defray costs of a debate among competing candidates is properly regarded as a "contribution" or "expenditure" within the meaning of that provision. See Pet. App. 27a & n.16.

[5] Indeed, when the District of Columbia Circuit confronted the FECA, it held that the terms "contribution" and "expenditure" in Section 441b are ambiguous, and has deferred to the Commission's determination that a corporate donation to a picnic at which an incumbent candidate addressed constituents was not a corporate "contribution" prohibited by Section 441b. *Orloski* v. *FEC*, 795 F.2d 156, 161-167 (D.C. Cir. 1986); cf. *Common Cause* v. *FEC*, 842 F.2d 436, 445, 448 (D.C. Cir. 1988) (noting "the enormous subtleties and complexities inherent in the FECA's first-amendment-sensitive regime," and explaining that "[d]eference is particularly appropriate in the context of the FECA, which explicitly relies on the bipartisan Commission as its primary enforcer") (citation and internal quotation marks omitted).

Section 441b is to prevent the use of corporate and labor union treasury funds "amassed in the economic marketplace" in ways that would "provide an unfair advantage in the political marketplace." *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986). Section 441b "permits some participation of unions and corporations in the federal electoral process," *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 201 (1982), however, because neither Section 441b, nor the general definitions of "contribution" and "expenditure" contained in 2 U.S.C. 431(8) and (9), encompass every corporate or union disbursement having a conceivable effect on a federal election.

In 1974, Congress amended the Act to exclude "nonpartisan activity designed to encourage individuals to vote or to register to vote" from the Act's general definition of "expenditure." 2 U.S.C. 431(9)(B)(ii). In 1976, Congress incorporated into the Act, as 2 U.S.C. 441b, the long-standing prohibition of corporate contributions and expenditures previously codified at 18 U.S.C. 610. Section 441b includes a provision stating that, for purposes of that Section, the term "'contribution or expenditure' shall include" certain uses of money, "but shall not include" three activities, one of which is "nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families[.]" 2 U.S.C. 441b(b)(2)(B). The Conference Report accompanying the 1976 legislation explained the relationship between that provision and the exemption from the general definition of "expenditure" for "nonpartisan activity designed to encourage individuals to vote or to register to vote" contained in 2 U.S.C. 431(9)(B)(ii):

> The conferees' intent with regard to the interrelationship between sections [431(9)(B)(ii)] and [441b(b)(2)(B)] which permit such activities as assisting eligible voters to register and to get to the polls, so long as these services are made available without regard to the voter's political preference, is the following: these provisions should be read together to permit corporations both to take part in nonpartisan registration and get-out-the-vote activities that are not restricted to stockholders and executive or administrative personnel, if such activities are jointly sponsored by the corporation and an organization that does not endorse candidates and are conducted by that organization; and to permit corporations, on their own, to engage in such activities restricted to executive or administrative personnel and stockholders and their families. The same rule, of course, applies to labor organizations.

H.R. Conf. Rep. No. 1057, 94th Cong., 2d Sess. 63-64 (1976).

In 1979, the Commission conducted a rulemaking to address the application of the FECA to the funding and sponsorship of candidate debates.[6] The Commission

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[6] As we explain above (see note 1, *supra*), the Commission in 1979 promulgated two versions of the debate regulations. The Senate passed a resolution of disapproval as to the initial regulations, apparently on the ground that those rules would have precluded sponsorship of candidate debates by media entities. Both versions of the debate regulations permitted corporations and labor organizations to donate money to nonprofit staging organizations for use in conducting candidate debates. The fact that Congress did not disapprove the second version of the regulations, after the rules had been revised in response to the Senate disapproval resolution, "indicat[es] that Congress [did] not look

determined that "[b]ecause nonpartisan public candidate debates are similar in nature and purpose to registration and [get-out-the-]vote activity, * * * corporations and labor organizations are permitted to donate funds to nonprofit organizations qualified to stage debates." 44 Fed. Reg. 76,735 (1979). The FEC explained:

> Congress expressly indicated an intent to permit corporations and labor organizations to participate in nonpartisan activity aimed at encouraging voter participation where that activity was undertaken in conjunction with a nonpartisan nonprofit organization. Permitting corporations and labor organizations to donate funds to nonpartisan nonprofit organizations for the purpose of staging nonpartisan candidate debates furthers that express congressional intent. Candidate debates stimulate voter interest and hence "encourage individuals to register to vote or to vote." Inasmuch as candidate debates are in the public interest and encourage educated voter involvement, permitting corporations and labor organizations to donate funds to nonprofit nonpartisan organizations for their staging is consistent with congressional intent and policy.

Id. at 76,736. As the Commission observed in announcing the initial version of the debate regulations, "[u]nlike single candidate appearances, nonpartisan public debates are designed to educate and inform voters rather than to influence the nomination or election of a particular candidate. Hence, funds received and

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unfavorably" upon the provisions dealing with corporate disbursements to nonprofit staging organizations. *DSCC*, 454 U.S. at 34.

expended [by certain nonprofit organizations] to defray costs incurred in sponsoring nonpartisan public debates are not considered contributions or expenditures under the Act." *Id.* at 39,348.

The Commission also explained that "the prohibitions of 2 U.S.C. § 441b were not specifically aimed at the donation of corporate or union funds to a nonpartisan tax exempt organization." 44 Fed. Reg. at 39,350. It noted that the definition of "contribution or expenditure" in Section 441b(b) addresses payments "to any *candidate, campaign committee or political party or organization.*" *Ibid.* Because debate-staging organizations are required by the regulations to have "a history of nonpartisanship," and are prohibited by the Internal Revenue Code "from intervening in any political campaign on behalf of any candidate for public office," an "organization qualified to sponsor candidate debates would be neither a campaign committee, a political party nor a political organization referred to in 2 U.S.C. § 441b." *Ibid.*

The debate regulations at issue in this case are thus consistent with the text and purposes of the FECA. Although this Court has upheld certain restrictions on corporate campaign spending because of the special risks inherent in the corporate form, those compelling governmental interests do not require the Commission to adopt the most restrictive interpretation possible regarding corporate financial assistance to nonprofit, nonpartisan debate-sponsoring organizations. In sum, "Congress gave the choice as to the preferred reasonable interpretation to the FEC," Pet. App. 37a (and, to the extent it indicated a preference for any approach, favored the FEC's current interpretation, see note 6, *supra*). Accordingly, the court of appeals correctly

rejected petitioners' statutory challenge to the Commission's debate regulations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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